

any rehabilitation efforts unsuccessful. The trial court rejected the Commonwealth's argument by stating "the Court cannot accept the Commonwealth's contention that acceptance of responsibility is a condition precedent for treatment within the juvenile system." Petitioner's App. 21. Moreover, the trial court expressly recognized that Petitioner was presumed innocent in reaching the decision on his transfer motion. Based upon the extensive evidence and legal factors involved in this issue, the trial court found that Petitioner did not meet his burden of proving by a preponderance of the evidence that the transfer of his case to the juvenile justice system was in the public interest. Petitioner's App. 21

REASONS FOR OPPOSING THE WRIT OF CERTIORARI

This Honorable Court should not grant a writ of certiorari to review Petitioner's issue concerning the trial court's denial of Petitioner's motion to transfer his charges of Murder of the First Degree to the jurisdiction of the juvenile court, as this issue is solely premised upon material misstatements of the opinions authored by the trial court and the Pennsylvania Superior Court.

Petitioner's application for a writ of certiorari is premised upon wholesale misstatements and flawed interpretations of the facts of record, as well as the opinions of the trial court and the Pennsylvania Superior Court. In order to provide the relief requested by Petitioner, this Court would find it necessary to distort and alter the record in this case. As such, Petitioner fails to present a genuine issue of legal review to this Court.

A. Discussion of the Opinion of the Trial Court

First, Petitioner distorts the nature and scope of the opinion of the trial court. Petitioner's proclamation that the trial court based its decision to deny his transfer petition upon his lack of admission to his murder of his brother Gregory is highly erroneous. In fact, the trial court plainly states that Petitioner failed to meet his burden that the transfer of his case would be in the public interest: "The brutal nature of the crime, combined with the sophistication evidenced and the need for a greater accountability period than the five years lead the Court to determine that a trial in adult court is appropriate." Petitioner's App. 22.

Although Petitioner notes the statutory factors governing transfer of matters from adult to juvenile court, see Petitioner's Brief at 2, Petitioner fails to acknowledge the importance of any factors other than amenability to treatment, supervision or treatment as a juvenile. Petitioner concludes that the various factors listed in 42 Pa.C.S.A. § 6355 for a court's consideration "by their very nature, militate against transfer in a murder case, *e.g.*, the nature and circumstances of the offense and the impact of the offense on the victim and the community." In doing so, Petitioner ignores that amenability to treatment, supervision or rehabilitation as a juvenile is but one of seven factors for the trial court to consider in reviewing a transfer motion. Specifically, Petitioner disregards § 6355(a)(4)(iii)(F): "the adequacy and duration of dispositional alternatives available under this chapter and in the adult criminal system." The trial court strongly considered this factor in denying Petitioner's transfer motion.

Moreover, although Petitioner mistakenly touts § 6355(a)(4)(iii)(G) concerning amenability to treatment as "the only factor that really mattered in the case," Petitioner's Brief at 9, Petitioner fails to acknowledge all the factors concerning amenability as outlined in § 6355(a)(4)(iii)(G)(I-IX). Most notably, Petitioner fails to include any discussion of (G)(IV), the degree of criminal sophistication exhibited by the child. The absence of this factor in Petitioner's argument is critical as the trial court greatly considered this factor in denying Petitioner's motion for transfer.

Unlike Petitioner, the trial court methodically reviewed each factor mandated for its consideration under the Juvenile Act. Throughout a twenty-four page opinion, the trial court carefully analyzed each factor for transfer of proceedings outlined in § 6355(a)(4)(iii) to determine if Petitioner met his burden on this issue. Petitioner counters the thoughtful opinion of the trial court with a distortion of its factual findings and the record. For instance, Petitioner maintains that "several experts" testified that he was "unlikely to pose a future danger because domestic violence murderers are rarely recidivists." Petitioner's Brief at 14. The trial court specifically noted that one expert, in fact, reached such a conclusion: the expert for Petitioner. Petitioner's Brief at App. 16. The trial court also noted that the Commonwealth called two experts that concluded Petitioner had problems with rageful ideation and managing his anger. Petitioner's Brief at App. 16. Contrary to Petitioner's claims in his argument, the trial court found that with this divergent testimony, "[i]t is unclear what threat the [Petitioner] would pose to other members of the community." Petitioner's Brief at App. 17. The trial court held that Petitioner failed to meet his

burden of establishing this factor by a preponderance of the evidence.

Also, while Petitioner contends that § 6355(a)(4)(iii)(D) concerning the nature and circumstances of the offenses will always militate a denial of a transfer motion, the trial court took great care in analyzing this issue. Specifically, the trial court noted that "[i]f the allegations are true, the Petitioner's actions would establish prima facie evidence of premeditation in establishing an alibi, as well as sophistication and calculation in terms of setting the scene to appear as a third party break in; consummating the crime in a short time period; concealing a weapon; and maintaining his composure and consistency of his cover story in the face of numerous interviews with authorities over time." Petitioner's Brief at App. 17. The trial court concluded that the sophistication involved in this heinous murder of Gregory did not support a transfer to juvenile court. Such an analysis is not the mere rubber stamp that Petitioner implies in his brief.

As noted previously, Petitioner completely lacks an analysis of § 6355(a)(4)(iii)(F) concerning the adequacy and duration of dispositional alternatives under this chapter and in the adult criminal justice system. Yet Petitioner's failure to establish this factor weighed heavily in the trial court's decision to deny his transfer motion. Only the experts for Petitioner felt that five years of supervision and treatment, the maximum period available due to Petitioner's age, was appropriate in duration to rehabilitate Petitioner. Other experts and the juvenile probation department disagreed with Petitioner and his expert. Moreover, the Commonwealth presented testimony from the state correctional system that the adult system possessed a facility specifically designed to treat juvenile

offenders who commit violent crime. The trial court found that this facility provided the same treatment as in the juvenile system, but would also offer accountability necessary for a murder of this nature. Petitioner's Brief at App. 18-19.

Finally, in asserting to this Court that Petitioner was amenable to treatment, supervision or rehabilitation as a juvenile, Petitioner claims that he satisfied the requirements of § 6355(a)(4)(iii)(G) because Petitioner "had no record, no disciplinary problems, no history of violence." Petitioner's Brief at 13. In doing so, Petitioner solely discusses four of the nine factors for consideration regarding amenability to treatment. See § 6355(a)(4)(iii)(G)(II), (V-VI) and (VIII). The trial court also carefully considered those factors, Petitioner's Brief at App. 19-21, finding that Petitioner established certain factors that "may indicate a receptiveness to rehabilitation." Petitioner's Brief at App. 21.

Unlike Petitioner, the trial court also analyzed the other five factors concerning amenability to treatment within § 6355(a)(4)(iii)(G). First, under subsection (I), the trial court noted that Petitioner was fifteen, giving the juvenile justice system only five years to supervise Petitioner. In reviewing the maturity of Petitioner under subsection (III), the trial court noted that Petitioner's own experts were deeply divided on whether Petitioner was mature or immature for his age. The trial court again noted that "if the Commonwealth's allegations are true, the [Petitioner] exhibited a disturbing degree of sophistication and calculation in the perpetration of the crime," in discussing criminal sophistication under subsection (IV). In a discussion similar to that concerning § 6355(a)(4)(iii)(F), the trial court again concluded that five years of supervision was

insufficient concerning the issues of accountability associated with this murder while reviewing subsection (VII). In support of this conclusion, the trial court noted that Dr. Robert Sadoff, Petitioner's lead expert in support of five years being adequate to rehabilitate Petitioner, conceded that "predicting potential rehabilitation amounts to a 'fairly good educated guess.'" Petitioner's Brief at App. 20.

Based upon its review of the factors mandated for consideration under § 6355(a)(4)(iii)(G), the trial court held that Petitioner did not meet his burden of establishing by a preponderance of the evidence that he was amenable to treatment, supervision or rehabilitation as a juvenile. The trial court expressed it was "particularly concerned with the level of sophistication exhibited in the crime, as well as the need for a longer period of accountability should the Commonwealth's contentions ultimately be proven." Petitioner's Brief at App. 21. The trial court also noted that the testimony presented was "mixed" concerning Petitioner's openness to treatment alternatives and maturity. Petitioner's Brief at App. 21. Accordingly, the trial court concluded that Petitioner was not amenable to treatment.

Petitioner attempts to subvert the reasoned opinion of the trial court by referencing the trial court's statement that the issue of amenability to treatment was "a close question" and "a close call." Petitioner wants this Court to conclude that the trial court ruled against Petitioner because it concluded that Petitioner's "receptiveness to rehabilitation was questionable given that he denied the crime." Petitioner's Brief at 9.

Nowhere in the trial court's opinion did it find that rehabilitation efforts for Petitioner were questionable

because Petitioner did not admit to murdering his brother. In fact, the trial court chastised the Commonwealth for asserting this exact point for its consideration of amenability. The trial court expressly stated that it "cannot accept the Commonwealth's contention that acceptance of responsibility is a condition precedent for treatment within the juvenile system." Petitioner's Brief at App. 21. Notably, Petitioner fails to include in his statement of facts or argument any mention of this ruling by the trial court. Accordingly, Petitioner's characterization of the opinion is premised upon misstatement and omissions, which are directly refuted by the plain language of the trial court's opinion.

Petitioner further attempts to distort the holding of the trial court by stating out of context that the trial court cited to cases where jurisdiction was transferred back to juvenile court and the juveniles accepted responsibility for their crimes. Petitioner's Brief at 9, App. 21. Petitioner fails to discuss that his lead expert, Dr. Sadoff, opined "that if, in fact, [Petitioner] committed the crime, and continues to deny his involvement up to and even after a conviction, then his prognosis for rehabilitation is poor." Petitioner's Brief at App. 16-17. Moreover, Dr. Sadoff's opinion was consistent with those of the other experts in this case. Petitioner's Brief at App. 20. The trial court did note this testimony of Petitioner's main expert, as well as the concurrence of all other experts.

Contrary to the position of Petitioner, the trial court, upon mention of expert testimony and/or case law within its twenty-four page opinion, contemporaneously acknowledged the constitutional safeguards held by Petitioner. The trial court asserted that the Petitioner was cloaked with the presumption of innocence when it noted the

expert opinion of Dr. Sadoff concerning Petitioner's rehabilitation prognosis if he denied committing the murder. Petitioner's Brief at App. 16-17, 20. Moreover, immediately prior to noting the Pennsylvania case law where jurisdiction was transferred back to juvenile court and the juveniles accepted responsibility for their crimes, the trial court made its express ruling that it "cannot accept the Commonwealth's contention that acceptance of responsibility is a condition precedent for treatment within the juvenile system." Petitioner's Brief at App. 21.

In conclusion, Petitioner erroneously asserts through a series of misstatements and distortions of the record that the trial court based its decision to deny his motion to transfer the proceedings to juvenile court upon Petitioner's failure to admit that he murdered his brother. The plain language of the trial court's opinion showed that it expressly rejected such a position. Quite simply, Petitioner failed to meet his burden by a preponderance of the evidence that transfer of his case to the juvenile justice system was in the public interest. Accordingly, Petitioner fails to present a legitimate due process claim for this Court's consideration.

B. Discussion of the Opinion of the Superior Court of Pennsylvania

Petitioner mentions the decision of the Superior Court of Pennsylvania in only one paragraph of its brief. Petitioner's Brief at 9. In this paragraph, Petitioner asserts that the Superior Court held that the trial court did not infringe on Petitioner's presumption of innocence in denying Petitioner's transfer motion. *Id.* Petitioner further asserts that the Superior Court did not address the issue

that his amenability to treatment and a transfer of proceedings to juvenile court depended upon him admitting guilt before trial, thereby violating due process. *Id.* This assertion is wholly inaccurate, as the Superior Court ruled against Petitioner on this very issue.

The Superior Court characterized Petitioner's challenge to the denial of his transfer petition as follows: "the [trial] court misapplied the law by relying on an impermissible factor, namely, [Petitioner's] failure to admit culpability." Petitioner's Brief at App. 38. The Superior Court also noted that Petitioner made a "forceful argument" against allowing a trial court to consider a juvenile's refusal to admit his commission of a crime in reviewing a transfer petition. *Id.* The Superior Court then expressly agreed that the law does not allow a determination of a juvenile's amenability to treatment to be dictated by a juvenile's exercise of his privilege against self-incrimination. *Id.* Accordingly, the Superior Court adopted the legal argument that Petitioner asserts in this writ of certiorari to this Court.

The Superior Court disagreed with Petitioner's contention that the trial court relied upon Petitioner's assertion of his privilege against self-incrimination in denying his transfer motion. The Superior Court took express issue with Petitioner's statements that the trial court "repeatedly focused on the failure of [Petitioner] to admit culpability," and that this unconstitutional factor was "threaded through" its opinion. Petitioner's Brief at App. 38. The Superior Court noted that the trial court only mentioned Petitioner's decision to maintain his innocence twice in the twenty-four page opinion. *Id.* The Superior Court then noted that every time the trial court "emphasized the fact that [Petitioner] was presumed innocent."

Id. The Superior Court concluded the trial court made clear that it followed all constitutional mandates when it "expressly rejected the Commonwealth's contention that acceptance of responsibility is a condition precedent for treatment within the juvenile system." *Id.* After discussing the basis for the trial court's denial of Petitioner's transfer motion, which the Commonwealth extensively analyzed *infra*, the Superior Court rejected Petitioner's position which is the same issue he raises in this petition for writ of certiorari: "Although [Petitioner] insists this decision was based on the fact that [Petitioner] had not admitted his culpability, the record does not support [Petitioner's] claim." *Id.*

Contrary to Petitioner's assertions to this Court, the Superior Court ruled on the question contained within this petition for writ of certiorari. The Superior Court agreed with Petitioner that a constitutional violation would exist if a court premised amenability to treatment and a transfer of proceedings to juvenile court upon a juvenile admitting guilt before trial. The Superior Court also made clear that the trial court did not rely on this impermissible factor in denying Petitioner's transfer motion. In doing so, the Superior Court did not accept Petitioner's invitation to distort and misstate the record. The Commonwealth urges this Court to do the same and, following the plain language of the trial court and Pennsylvania Superior Court opinions, deny his petition for writ of certiorari.



CONCLUSION

For all the foregoing reasons, the Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 05-444

IN THE
**Supreme Court of the
United States**

OCTOBER TERM, 2005

ZACHARY WITMAN,
Petitioner,

—against—

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF
PENNSYLVANIA

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO **BRIEF IN OPPOSITION**

The Commonwealth attempts to deflect attention from the important constitutional issue posed in this case by misstating the evidence. This Petition, however, raises a due process claim that does not depend on the inaccurate evidentiary picture painted by the Commonwealth. Rather, the issue centers on the decision to try 15-year old Zach Witman as an adult, even though numerous experts testified he was an excellent candidate for treatment in a juvenile facility, because Zach did not acknowledge guilt and, therefore, according to the Commonwealth's experts, could not be rehabilitated.

The Commonwealth focuses on the testimony of its blood spatter "expert," but fails to acknowledge the deficiencies in its case, including the absence of any blood on Zach's hair or face; the absence of any evidence that Zach had cleaned up his hair or his face (and the drains were checked for such evidence); the lack of any fiber transfer from the wet bloodied soccer gloves to Zach's body or clothing; the failure to find Zach's DNA on the gloves, even though he had an oozing cut on his hand; the failure to produce any photographs of the alleged luminol trail; the failure to show that the footprints in the back yard were consistent with Zach's foot size; and the failure to find any traces of blood upstairs even though, just minutes before he called 911, Zach spoke to Greg's friend from the upstairs telephone.

The Commonwealth suggests – as it has throughout this case – that Zach must have killed his brother because he was the only one home. That Zach was home alone does not make Zach a killer. It is far more reasonable to conclude that Zach found his brother just minutes after the attack, immediately called 911 upon discovering him, moved his brother's body at the insistence of the 911 dispatcher, and had blood splattered onto his clothing when his brother's head fell into a puddle of blood. Indeed, the most compelling evidence of innocence is that Zach

was a 15-year old boy with no history of violence towards his brother or anyone else. As even the Commonwealth concedes, Zach had no reason to kill his brother. Based on the family dynamics and this child's history, it is simply inconceivable that Zach committed this brutal crime.

This Petition, however, is not about the evidence. It is about due process and a state system that demands that a child acknowledge guilt as a precondition to transfer to the juvenile justice system.

As to that issue, the Commonwealth's Opposition only reinforces the merits of petitioner's claim. The Commonwealth argues that Zach's refusal to admit guilt was not the dispositive factor in the decision to try him as an adult. But the trial court's other findings, which the Commonwealth highlights, rest on the presumption that Zach is guilty. The Commonwealth contends, for example, that the trial court relied on the "sophistication" of the crime in deciding not to transfer Zach to juvenile court. There was nothing sophisticated about the brutal attack on Greg. A court could conclude it was "sophisticated" only if the court accepted the Commonwealth's theory, never proven, that Zach somehow set this up well in advance. The very finding of sophistication belies the court's insistence that it was not impinging on Zach's presumption of innocence.

Likewise, the trial court concluded that five years was not an adequate time for Zach to be "rehabilitated." That finding, too, is only supportable if the court assumes that Zach is guilty, is denying his guilt, and, therefore, is not amenable to treatment in a five year period.

This was, as the trial court recognized, a "close call." (App. 21) The court may have said that Zach's refusal to admit guilt was not dispositive, but the record leaves little doubt that it was the critical factor in assessing his amenability to treatment. The Commonwealth's expert, contrary to the defense experts,

testified that, absent an acknowledgment that he had killed his brother, Zach could never be rehabilitated, let alone in five years. And, the court found it "noteworthy" that, in Pennsylvania, only children who had acknowledged guilt had ever been transferred to juvenile court. (App. 21)

Zachary Witman undoubtedly would have increased the odds of having his case transferred to juvenile court and avoiding a sentence of life in prison without the possibility of parole had he only confessed to a crime that he has always denied committing. Nothing that the Commonwealth has said can change that reality. This Petition, therefore, squarely raises the important question as to whether it violates due process to require that, as a pragmatic precondition to transfer, a child admit to guilt to demonstrate his amenability to treatment in a juvenile facility.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully,

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Dated: November 15, 2005